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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Review of the Pioneer's
Preference Rules

To: The Commission

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ET Docket No. 93-266

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

This rule making requests comment on the appropriateness of the Federal Communications Commission's (the "Commission") pioneer's preference rules in light of Congress' recent enactment of competitive bidding authority to select licensees from among mutually exclusive applicants.

Nextel Communications, Inc. ("Nextel" formerly Fleet Call, Inc.) agrees that the fundamental public policy purpose of the pioneer's preference rules -- overcoming the risk, uncertainty and delay inherent in comparative hearings and licensing by random selection -- can be effectively achieved by using competitive bidding to select among mutually exclusive applicants. Auctions assure that those who most value a resource have an opportunity to obtain it. By outbidding other applicants for a desired license, a bidder/innovator has control over and a reasonable expectation of being licensed to provide the service or technology derived from its innovation. True innovators will be able to attract sufficient capital to participate in auctions making licensing preferences unnecessary.

The Commission's attempt to reward developers of innovative Personal Communications Services ("PCS") technologies with licensing preferences has not been successful. Numerous speculative experimental PCS applications have been filed creating a "pioneer's lottery" for PCS licensing preferences. This has overburdened the Commission's resources and frustrated its ability

to develop and articulate meaningful decisional standards. As a result, the Commission's explanation for its tentative PCS preference awards is legally inadequate and will engender protracted litigation impeding the timely delivery of PCS services. The pioneer's preference rules have stimulated rampant speculation undercutting their purpose and justification and warranting their repeal.

In the alternative, the Commission seeks comment on amending the pioneer's preference rules to better comport with a competitive bidding environment. If the Commission retains its pioneer's preference rules, Nextel submits that a preference grantee should pay an amount equivalent to the auction value of the spectrum; i.e., a matching amount equal to that paid by the successful bidder for the same type of license, less a discount of 10 percent. This is necessary to avoid anticompetitive inequities in the cost of obtaining Commission authorizations. Pioneer's preferences are intended to assure that innovators have a reasonable opportunity to obtain a license for the service resulting from their innovation. This in no way requires a "free" license, but only that one be "reserved" for selected pioneers.

Given the limited objectives of the pioneer's preference rules, a pioneer's preference grantee for a 2 GHz broadband PCS license should receive a single license for the smallest PCS market size and spectrum block being auctioned. This would be a 10 MHz Basic Trading Area ("BTA") license for a single BTA only, not for a multi-BTA license created by a combinatorial bid. This would

achieve the underlying objective of the pioneer's preference rules (assuring innovators a reasonable chance for a license), with minimal anticompetitive impact on other PCS licensees or the effective use of competitive bidding procedures.

If the Commission awards PCS pioneer's preferences, Nextel's application must be granted. Nextel has demonstrated that it is the unrivaled pioneer in developing a highly-efficient, frequency-agile digital mobile communications technology for new 2 GHz PCS services. Its Digital Mobile technology comports with every one of the characteristics of innovation enumerated in the Commission's pioneer's preference rules and decisions. It is the first to offer an all digital, fully integrated mobile network combining advanced digital cellular telephone service, alphanumeric paging, two-way dispatch radio and full featured voice mail -- all accessible through a single compact subscriber unit.

Digital Mobile incorporates "intelligent network" capabilities permitting customers to replace their individual cellular, pager and voice mail phone numbers with a single "Personal Telephone Number" that directs calls to wherever the subscriber is located. This innovation is the heart of the ultimate PCS vision of personal mobility. Nextel's innovative Digital Mobile technology is bringing mobile communications to a "more advanced or effective state" -- the standard for awarding a pioneer's preference.

Furthermore, Nextel has proven that Digital Mobile is feasible by placing its first such system in day-to-day operation in Los Angeles last August. While other PCS pioneer's preference

applicants scramble to revise their experimental tests and theoretical models, Nextel is "on-the-air" providing previously unavailable new services and communications capabilities. The Commission has previously found Nextel's Digital Mobile technology "unique" and "innovative;" if the Commission finds that PCS pioneer's preferences are warranted, Nextel's application must be granted.

innovation.^{3/} In a competitive bidding environment, an innovator will have a reasonable opportunity to obtain a desired license making pioneer's preferences unnecessary. A true innovator will attract the necessary capital to participate in the auction licensing process.

Accordingly, the Commission seeks comment on whether the new competitive bidding authority obviates the basis for awarding pioneer's licensing preferences. It asks whether the original basis and purpose of the pioneer's preference rules remains valid, whether they should be amended to account for competitive bidding and the Commission's experience in administering pioneer's preference requests, or whether the rules should simply be repealed.^{4/}

II. BACKGROUND

The pioneer's preference rules provide that an applicant may be granted a dispositive licensing preference if it demonstrates that:

" . . . it has developed an innovative proposal that leads to establishment of a service or technology not currently provided or a substantial enhancement of an existing service . . . "^{5/}

The Commission determines whether a proposal is innovative by

^{3/} Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) (the Pioneer's Preference Order"); recon. 7 FCC Rcd 1808 (1992); further recon. den., 8 FCC Rcd 1659 (1993).

^{4/} Notice at para. 1.

^{5/} Pioneer's Preference Order at para. 47 and Section 1.402(a) of the Commission's Rules; Notice at para. 3.

examining whether it develops the capabilities or possibilities of a technology or service or brings them to a more advanced or effective state, and whether it is feasible.^{6/} An applicant granted a preference is not subject to competing applications and, if otherwise qualified, receives a license. Other mutually exclusive applicants can compete for additional licenses on a separate track.

The Commission authorized pioneer's preferences because it found that its licensing processes discouraged investment in new technologies and services by denying innovators the ability to recoup their investments by obtaining a license to provide the new service.^{7/} In other words, the Commission believed that the difficulty and uncertainty of bringing new services to market under comparative hearing or random selection licensing was inhibiting their development and implementation. This was particularly true for random selection or "lottery" licensing procedures under which the true innovator of a service or technology is rarely selected.^{8/}

Given the rampant speculation in lotteries for new radio

^{6/} Id. at para. 48. See also Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, Tentative Decision, 7 FCC Rcd 1625 (1992).

^{7/} Pioneer's Preference Order at paras. 10 and 18-19.

^{8/} By the mid-1980's, the Commission had virtually abandoned comparative hearings to select among mutually exclusive applicants for radio authorizations. It adopted the widespread use of lotteries to avoid the delays and costs inherent in comparative selection; these advantages, however, have been undercut by unmanageable speculation.

services, innovators had little chance of being selected from among numerous speculators and thus little incentive to develop innovative offerings. The pioneer's preference rules were intended, therefore, to eliminate the risk, uncertainty and delay inherent in random selection licensing by granting innovators a reward in the form of a dispositive licensing preference in the new service produced by their innovation.^{9/}

Nextel requested a preference for a 2 GHz Personal Communications Service ("PCS") license for the Greater Los Angeles area based on its development of Digital Mobile communications technology.^{10/} Nextel is a pioneer in developing advanced, highly-efficient personal communications services technology. It conceptualized, acquired spectrum to implement and is constructing Enhanced Specialized Mobile Radio ("ESMR") systems using "Digital Mobile" technology in the ten largest and most frequency-congested metropolitan areas in the country.^{11/} This technology enables Nextel to protect existing licensees in a congested radio frequency

^{9/} Pioneer's Preference Order at para. 32.

^{10/} Request for a Pioneer's Preference in the Licensing Process for Personal Communications Services, Gen. Docket 90-314, PP-61, filed May 4, 1992 ("Fleet Call Request").

^{11/} On February 13, 1991, the Commission authorized Fleet Call to construct and operate 800 MHz ESMR systems in Chicago, Dallas, Houston, Los Angeles, New York and San Francisco. In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991) (the "Fleet Call Waiver Order"), recon. den. 6 FCC Rcd 6989 (1991). Through its merger with Dispatch Communications, Inc. and other acquisitions, Nextel will hold authorizations to construct ESMR systems in the top 10 markets in the Nation covering more than 100 million persons.

("RF") environment while creating a seamless integrated network offering advanced mobile communications providing an optimum platform for broadband PCS.

Nextel initiated service on its first ESMR system in Los Angeles in August of 1993 and has committed well over \$300 million dollars to developing and implementing this innovative technology. As a pioneer's preference applicant, and the first carrier to initiate advanced, all-digital wide-area communications services, Nextel has a significant interest in the outcome of this proceeding and offers the following comments.

III. DISCUSSION

A. Competitive Bidding Obviates the Public Policy Rationale for Pioneer's Preferences

Nextel compliments the Commission on its insight in reviewing the need for pioneer's preferences in a changed regulatory environment. Nextel agrees that the fundamental public policy purpose of the pioneer's preference rules -- overcoming the licensing risks, uncertainty and delay inherent in comparative hearings and lotteries -- can now be achieved without preferences as a result of the Congressional directive to use competitive bidding to select among mutually exclusive applicants.

Nextel has long advocated auctions as the most economically efficient method of placing spectrum in the hands of entities who will put it to its highest and best use. The auction process assures that those who most value a resource have an opportunity to obtain it. By outbidding other applicants for a desired license, a bidder/innovator has control over and a reasonable expectation of

being licensed to provide the service or technology derived from its innovation.^{12/} This makes it unnecessary to grant innovators a licensing preference.

In the Budget Act, Congress directed the Commission to establish competitive bidding systems that, inter alia, promote the development and rapid deployment of new technologies, economic opportunities and competition, and ensure that new and innovative technologies are available to the American people.^{13/} It also requires the Commission to commence licensing of PCS using competitive bidding by May 7, 1994, thereby precluding unreasonable delay in the licensing process. The competitive bidding procedures the Commission is adopting in PP Docket No. 93-253 will achieve the underlying objectives of the pioneer's preference rules;^{14/} i.e., assuring that innovators have a reasonable expectation of obtaining licenses to exploit their innovation without undue delay. This makes the pioneer's preference rules superfluous.^{15/}

^{12/} A true innovator will attract financial support for participating in the competitive bidding process from financial institutions, venture capitalists or joint ventures or partnerships with other applicants that desire joining with the service innovator as well as its own financial resources.

^{13/} Section 309(j)(3) of the Act.

^{14/} See Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making, FCC 93-455, released October 12, 1993 (the "Auction NPRM").

^{15/} In addition, retaining the pioneer's preference rules would confer no particular benefit on small businesses or other variety of applicants. See Notice at para. 11. The Budget Act amendments specifically direct the Commission to establish competitive bidding systems that assure that licenses are available to small business, rural telephone companies, and businesses owned
(continued...)

B. Administration of the Pioneer's Preference Rules
Has Proved Unworkable

The Commission's experience with pioneer's preference requests for broadband PCS licenses at 2 GHz demonstrates convincingly that preferences will not automatically assure that PCS licenses are granted to bona fide PCS innovators, or otherwise expedite PCS licensing. On the contrary, the Commission's attempt to reward developers of innovative PCS technologies with dispositive licensing preferences has engendered a plethora of speculative experimental applications hoping to evade the uncertainty of random selection. Nextel believes that less than 20 percent of the more than 90 applicants for a PCS pioneer's preference made a credible showing of responsibility for an innovative technology that could lead to establishment of new PCS services.^{16/} Most of these applicants are essentially speculators thus creating a new "pioneer's lottery;" only a handful have empirical support for their positions.

The large number of speculative "pioneer's lottery" applications filed for PCS pioneer's preferences has overburdened the Commission's resources and contributed to the difficulty of developing and articulating meaningful decisional standards. In its Tentative Decision awarding three preferences, the Commission

^{15/}(...continued)
by members of minority groups and women. The Commission is addressing these objectives in its competitive bidding rules proposal.

^{16/} See Tentative Decision for Pioneer's Preference, Gen. Docket No. 90-314, 7 FCC Rcd 7794 (1992) (the "Tentative Decision").

utterly failed to explain the reasons for its selections, thereby denying Nextel and other non-selected applicants legally adequate notice of the grounds for the decision. The Tentative Decision is arbitrary, capricious and an abuse of discretion and will not withstand judicial review.^{17/} It will inevitably engender protracted litigation should it be finalized impeding the delivery of PCS services until well-after the Congressionally-mandated initiation of PCS licensing by competitive bidding. As these difficulties demonstrate, the pioneer's preference rules have themselves stimulated rampant speculation undercutting their purpose and public policy justification.

C. If the Pioneer's Preference Rules are Maintained, Preference Grantees Should Pay for their Licenses

In the alternative, the Notice seeks comment on how the pioneer's preference rules should be amended to better work in a competitive bidding environment.^{18/} Nextel believes that competitive bidding obviates the need for pioneer's preferences, as discussed above, and that the pioneer's preference rules should be revoked.^{19/} If the Commission finds their continuance warranted, however, a pioneer's preference grantee should not receive a

^{17/} See Comments of Fleet Call, Inc. on the Tentative Decision for Pioneer's Preferences, Gen. Docket No. 90-314, filed January 29, 1993 at pp. 16-19 ("Fleet Call Tentative Decision Comments").

^{18/} Notice at para. 12.

^{19/} Nextel agrees that the pioneer's preference awards to Volunteers in Technical Assistance and MTEL should not be affected by this proceeding. Notice at para. 18. Any action taken herein to repeal the pioneer's preference rules should apply to the four pending tentative grants listed in paragraph 19 of the Notice.

license for free. To prevent anticompetitive inequities in the cost of obtaining Commission authorizations, a pioneer's preference grantee should pay an amount equivalent to the auction value of the spectrum; i.e., a matching amount equal to that paid by the successful bidder for the same type of license, less a discount of 10 percent.^{20/}

The purpose of the pioneer's preference rules, as discussed above, is to assure that innovators have a reasonable opportunity to obtain a license for the service resulting from their innovation. This in no way requires that the license be free, but only that the a license be "reserved" for selected pioneers. Congress has directed the Commission to employ competitive bidding to select among mutually exclusive license applicants in "for-profit" services. Competitors of the preference grantee must pay a market-determined price for a license to the U.S. Treasury. There is no legal or policy justification for exempting licensing preference grantees from paying the approximate market price for the "for-profit" use of public spectrum resources.

Given these considerations, and the limited objectives of the pioneer's preference rules, a pioneer's preference grantee for a 2 GHz broadband PCS license should receive a single license for the smallest PCS market size and spectrum block being auctioned. Under the PCS market structure adopted in the PCS Allocation Order, this

^{20/} This discount balances the public policy benefit of providing an additional incentive for innovators to bring new technologies to market with the need to avoid imposing unreasonable anticompetitive impacts on prospective competitors.

would be a 10 MHz Basic Trading Area ("BTA") license. The license should be for a single BTA only, not for a multi-BTA license created by a combinatorial bid. This approach is in the public interest as it achieves the underlying objective of the pioneer's preference rules (assuring that an innovator has a reasonable chance for a license), with minimal anticompetitive impact on other PCS licenses or the effective use of competitive bidding procedures.

D. If the Commission Awards PCS Pioneer's Preferences, Nextel's Pioneer's Preference Application Must Be Granted

As noted above, the pioneer's preference rules provide for granting a licensing preference to an entrepreneur that develops an innovative technology or service that leads to establishment of new services or substantially enhances existing service offerings. Nextel has demonstrated to the Commission that it is the unrivaled pioneer in developing a highly-efficient, frequency-agile digital mobile communications technology that will enable Nextel to establish new 2 GHz PCS services.^{21/}

Nextel's Digital Mobile technology is a revolutionary innovation making it possible to create a new spectrally-efficient digital mobile communications system within the existing 2 GHz RF environment. It is more innovative and effective than the Frequency Agile Sharing Technology ("FAST") developed by American Personal Communications ("APC") upon which the Commission found

^{21/} See Fleet Call Tentative Decision Comments which include a detailed discussion of why Nextel should receive a PCS licensing preference.

grant of a tentative preference warranted.^{22/} Whereas, FAST purports to enable PCS to share the 2 GHz band with existing *fixed* microwave systems, Digital Mobile enables new PCS systems using non-contiguous spectrum to coexist with co-channel mobile systems - a more considerably more demanding and preference-worthy innovation.

Digital Mobile technology comports with every one of the characteristics of innovation enumerated in the pioneer's preference context.^{23/} It brings added functionality and improved operating and technical characteristics to the mobile services. It offers vastly increased spectrum efficiency, improved communications quality, and reduced costs for the public. Nextel's Digital Mobile technology offers unprecedented breakthroughs in the use and control of mobile communications systems to increase productivity, safety and convenience. It is the first to offer an all digital, fully integrated mobile network combining advanced digital cellular telephone service, plus a 140 character alphanumeric pager, two-way dispatch radio and full featured voice mail -- all accessible through a single compact subscriber unit.

Furthermore, Digital Mobile incorporates "intelligent network" capabilities that can permit customers to replace their individual cellular, pager and voice mail phone numbers with a single "Personal Telephone Number" that directs calls to wherever the

^{22/} Tentative Decision at paras. 7-11.

^{23/} See Fleet Call Tentative Decision Comments at pp. 9-11; Section 1.402(a) of the Commission's Rules; Tentative Decision at para. 3.

subscriber is located. This innovation is the heart of the ultimate PCS vision of personal mobility. Nextel's innovative Digital Mobile technology is bringing mobile communications to a "more advanced or effective state" -- the sin qua non of a pioneer's preference.^{24/}

Moreover, unlike every other PCS pioneer's preference application, Nextel has proven that Digital Mobile is feasible by placing its first such system in day-to-day operation in Los Angeles last August. Nextel's Digital Mobile network is operating across approximately 18,000 square miles from Santa Barbara in the north to Oceanside in the south, and from Santa Catalina Island off the Los Angeles coast to Palm Springs in the east. While other PCS pioneer's preference applicants scramble to revise their experimental tests and theoretical models, Nextel is "on-the-air" providing never-before available new services and communications capabilities in one of the most congested and demanding RF environments in the Nation. The Commission has already determined that Nextel's Digital Mobile technology is "unique" and "innovative;"^{25/} its failure to award Nextel a PCS licensing

^{24/} The Notice expresses concern that pioneer's preferences should not be awarded for new services per se, but "only for new technologies used to provide new services or that significantly improve existing services." Notice at para. 17. Nextel submits that if the Commission retains pioneer's preferences, current PCS preference applications must be considered under existing standards, not under revisions proposed in this Notice. Regardless, as demonstrated above, Digital Mobile is a dramatic new innovative technology making both new services and improved existing services possible. It is not merely a transference of technology among frequency bands.

^{25/} Fleet Call Waiver Order at para. 11.

preference cannot be justified.

IV. CONCLUSION

Nextel compliments the Commission on its decision to review its pioneer's preference rules in light of the availability of competitive bidding licensing procedures. Nextel respectfully submits that the pioneer's preference provisions have become unnecessary and should be revoked. Competitive bidding assures innovators a reasonable opportunity to obtain a license for the service arising from their innovation and will also minimize licensing process delays. The difficulties the Commission is experiencing in processing applications for PCS pioneer's preferences militates toward reliance on the inherent market-value judgments of competitive bidding to assure that spectrum is licensed to those that value it the most and will put it to optimum use.


If the Commission chooses, however, to retain pioneer's preferences, it should limit PCS preference grantees to a single 10 MHz BTA license and require each grantee to pay an amount equal to the winning bid for the BTA, less a discount of 10 percent.

Finally, Nextel's PCS preference application meets every test the Commission has articulated for a preference. If the Commission

goes forward with awarding pioneer's preferences for PCS, Nextel's application must be granted.

Respectfully submitted,

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November 15, 1993

CERTIFICATE OF SERVICES

I hereby certify that a copy of the foregoing Comments of Nextel Communications, Inc. has been mailed by United States first class mail, postage prepaid, this 15th day of November 1993, to the following:

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